SCOTT & ENGLISH (M) SDN. BHD.

v.

LEIKIE REFRIGERATION & STAINLESS STEEL INDUSTRIES SDN. BHD. & 2 ORS.

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[CIVIL SUIT NO. KG. 111 OF 1991]
3 MAY 1994

PRACTICE & PROCEDURE: Application for extension of time to appeal - Delay of nearly 18 months - Whether there was a reasonable explanation for the delay - Application made under O. 3 r. 5 RHC 1980 - Whether mistake of advocate an absolute bar - Factors to be considered in application for grant of extension of time.

The plaintiff obtained summary judgment against the defendants on 25 January 1992 which judgment was stayed pending the outcome of the trial of the counterclaim of the first defendant. The plaintiff applied to vary the terms of the order granting the stay and the SAR, on 24 October 1992, granted the plaintiff's application to substitute the words in the order of 25 January 1992.

The defendants appealed against the order made on 24 October 1992 and the appeal was allowed on 22 July 1993 on the grounds that the order dated 25 January 1992 having been drawn up, passed and entered, the SAR had no jurisdiction to vary or amend the same (See [1993] 4 CLJ 176). On 23 July 1993, the plaintiff filed the application for extension of time to appeal against the SAR's order of 25 January 1992.

The defendants objected to the plaintiff's application contending that mistake on the part of the solicitor is not a sufficient reason for the grant of the extension.

Held:

[1] The grant of extension of time to appeal is a matter of discretion for the Court and the Court in the exercise of its discretion would normally consider the length of the delay, the reasons for the delay, the chances of the appeal succedding if time for appealing is extended and the degree of prejudice to the potential respondent if the application is granted. The solicitor's mistake, its nature and the circumstances under which it was made are also factors to be considered by the Court.

[2] However these factors are merely a framework or guide for the purpose of exercising the discretion and are not intended to be rigid mandatory requirements. It is not necessary that all the factors must be in favour of an applicant in order that the discretion may be exercised for the applicant's benefit.

[3] On the facts and circumstances of the case, the delay, though of some considerable time, has been reasonably explained and has been shown to be connected to steps taken in relation to the order of 25 January 1992 now intended to be appealed against.

[4] In looking at the element of chances of success of the appeal, there appears to be some merits in that the amount entered for the judgment appears to far exceed the amount of the counterclaim, which in any event is only made by the first defendant. In addition there would be no prejudice to the defendants should extension of time be granted to the plaintiff.

[5] Having considered the facts and circumstances of the case relating to the application for extension of time and testing them against the factors to be taken into account, the discretion of the Court ought to be exercised in favour of granting the relief sought.

[Plaintiff's application for extension of time to appeal allowed with costs to the defendants].

Cases referred to:

Gan Hay Chong v. Siow Kian Yuh & Anor. [1975] 2 MLJ 129 ***(refd)***

Sinnathamby & Anor v. Lee Chooi Ying [1987] 1 MLJ 110 ***(refd)***

Hau Khee Wee & Anor. v. Chua Kian Tong & Anor. [1987] 2 MLJ 146 ***(refd)***

Pearson v. Chen Chien Wen Edwin [1991] 3 MLJ 208 ***(refd)***

Development & Commercial Bank Bhd. v. Tan Ong Hwa [1992] 2 MLJ 764 ***(refd)***

Batang Kali Estates Sdn. Bhd. v. Romani bte Abdul Aziz & Anor. [1993] 2 MLJ 267 ***(refd)***

C.M. Van Stillevoldt BV v. El Carriers Inc. [1983] 1 AER 699 ***(refd)***

N v. N [1993] 2 FLR 868 CA

Norwich & Peterborough Building Society v. Steed [1991] 1 WLR 449 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 3 r. 5(1), O. 56 r. 1(3)
Rules of the Supreme Court 1980, r. 56

Other source referred to:

Mallal's Supreme Court Practice, 2nd Edn., Vol. 1, para 3/5/8

For the plaintiff - T. O. Thomas; M/s. Thomas & Co.
For the defendants - N. C. Jie; M/s. Jie Nyuk Choo & Co.

JUDGMENT

Chong Siew Fai J:

In this summons the plaintiff applies under O. 3 r. 5 of the Rules of the High Court 1980 for extension of time to appeal against the order of the learned Senior Assistant Registrar given on 25 January 1992 ordering that "execution of this Judgment be stayed pending the outcome of the trial of the counterclaim or further order".

The application is supported by the affidavit, of its area manager Victor Chin Jun Hock affirmed on 26 February 1994. The defendants opposed the application. Though an affidavit in opposition was filed, Counsel for the defendants, owing to the plaintiff's objection to its being used, chose not to reply on it. I do not think the defendants are in any way adversely affected by the move since the objection contained in the written submission 'RESPT' could properly and effectively be advanced without the aid of the affidavit.

For the defendants, it was contended that the application was defective in that it sought an order to appeal as opposed to extend the time to appeal. I see no merit in the argument. The relevant wording in the summons reads thus:

> for an order that notwithstanding the time limited .....for doing so has expired, the plaintiff be at liberty to appeal.....

It clearly indicates that leave is sought to appeal out of time.

The background relevant to the application may be thus briefly stated. By the order dated 25 January 1992, the plaintiff obtained summary judgment against the 3 defendants in the sum of RM129,000 with interests amounting to RM15,503.07 and further interest and costs. The order also decreed:

> that execution of this Judgment be stayed pending the outcome of the trial of the counterclaim or further order.

The counterclaim is made only by the 1st defendant and then for the specified sum of RM16,613.50 with interest plus damages for breach of contract and costs. There is no suggestion or material indicating the quantum or extent of the damages claimed.

Against that part of the order made on 25 January 1992 staying execution of the judgment, the plaintiff did not lodge any notice of appeal which under O. 56 r.1(3) would have to be issued within 5 days after the order appealed against was made i.e. by 30 January 1992, if there was an appeal. On 23 July 1993 the plaintiff took out the present summons applying for extension of time to appeal against the stay of execution. There is, therefore, a lapse of nearly $1^1/_2$ years since 30 January 1992.

What are the reasons? Are they reasonable? After the grant of the order dated 25 January 1992, the plaintiff by a summons dated 9 March 1992 applied to the Deputy Registrar seeking that that part of the decree quoted above staying execution of the judgment and contained in the said order dated 25 January 1992 be set aside or be substituted by the words:

> It Is Also Hereby Ordered that execution of part of this Judgment to the extent of RM16,613.50 being the amount claimed by the 1st defendant by its counterclaim, be stayed pending the outcome of the trial of the counterclaim or further order.

On 24 October 1992 the Senior Assistant Registrar granted the plaintiff's application and allowed the substitition of the words quoted above in the said order dated 25 January 1992. (For Ruling see Encl. 77).

By a notice of appeal dated 28 October 1992 the defendants appealed against the order made on 24 October 1992 allowing the substitution of the words. On 22 July 1993 I allowed the defendants' appeal on the ground that the order dated 25 January 1992 having been drawn up, passed and entered, the learned Senior Assistant Registrar had no jurisdiction to vary or amend the same. The order of 24 October 1992 was set aside. That means the order of 25 January 1992 stands intact.

On 23 July 1993 i.e. the day next following my decision on 22 July 1993, the plaintiff filed the application now before me for extension of time to appeal.

It will be noted from the above that the plaintiff, apart from the period 25 January 1992 (date of grant of the order) to 9 March 1992 (date of the application to stay and vary) had been taking prompt and active steps respecting that part of the Senior Assistant Registrar's order dated 25

January 1992 allowing stay of execution of the total judgment sum.

For the defendants it was contended that mistake on the part of the solicitor is not a sufficient reason for the grant of extension. A number of cases dealing with extension of time based on the Rules of Federal Court or Supreme Court both repealed and in force, were relied on. The former Federal Court rules on grant of leave to appeal out of time used such words as "special leave". Rule 56 of the Rules of the Supreme Court 1980, now in force, does not use such words. As for the difference between the provisions with the words "special leave" and those without them, Chang Min Tat, J. said in *Gan Hay Chong v. Siow Kian Yuh & Anor.* [1975] 2 MLJ 129 FC at 131:

> It must be immediately obvious that the requirement of the special leave of the full Court of Appeal lays on any applicant a heavier burden than the ordinary leave of a lower Court to win over the exercise of judicial discretion in his favour and that to cite or to rely on cases on the discharge of the burden for special leave in deciding whether ordinary leave should not be granted is to apply the wrong principle.

See also the commentary in **Mallal's Supreme Court Practice** 2nd Edn., Vol. 1 para 3/5/8. In our present case the appeal is from the decision of the Senior Assistant Registrar to the Judge in chambers as opposed to an appeal from the High Court to the Supreme Court. Order 3 r. 5(1) of the Rules of the High Court 1980 under which the present application is made, does not use the words "special leave" or "special circumstances" or the like.

On the contention that mistake on the part of the solicitor is not a sufficient reason for the grant of extension, I would again cite *Gan Hay Chong v. Siow Kian Yuh & Anor.* [1975] 2 MLJ 129 FC where Chang Min Tat J., referring to the learned trial Judge of the High Court, said:

> He concluded that a mistake by a solicitor was not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum of appeal.
>
> If he had taken the view that the mistake of the appellant's solicitors in the circumstances of this case was not such a ground, his view would, with respect, be unexceptionable but as a general dictum, it went, to my mind, too far. (Page 131).

In my view, the solicitor's mistake, its nature and the circumstances under which it was made are to be considered together with other factors to be mentioned in a moment. In *Sinnathamby & Anor. v. Lee Chooi Ying* [1987] 1 MLJ 110 SC, though the contention of Counsel was put in the opposite manner, the judgment of Mohamed Azmi SCJ, is, I think, pertinent. He said (page 112):

> Under r. 13 of the repealed Federal Court (Civil Appeals) (Transitional) Rules 1963, "special leave" of the full Court was required to bring an appeal out of time, but under the present r. 56 of Rules of the Supreme Court 1980 the word "special" has been omitted, and because of this change in the law which requires only ordinary leave, it is argued that the mistake of a legal adviser is no longer a ground for refusing an application for extension of time to appeal. In my view this is not so, for the effect of the change in the law merely widens the court's unfettered discretion under r. 56. In exercising its discretion, the Court would *inter alia* consider the reason for the delay, the length of the delay and the likelihood of prejudice to the successful party in the Court below. In view of the change in the law which no longer requires "special leave", where the mistake of a legal adviser is advanced as the reason for the delay, the Court is now free to consider it on its merits in the same manner that the Court would exercise its discretion in other cases. Thus, the ruling in *Re Coles & Ravenshear* [1907] 1 KB 1 and as well as *Chong Kueng Ying & Ors. v. Lovis Lavagna* [1972] 1 MLJ 180, which excluded the Court's discretion in cases where the delay was caused by the mistake of a legal adviser, should no longer be applicable after the coming into force of the Supreme Court Rules 1980. For the purpose of r. 56, this Court should be guided by the principle adopted by the Court of Appeal in England after the 1909 amendment of the English RSC as to extension of time for appeal.

The grant of extension of time to appeal is a matter of discretion for the Court. The following are factors normally to be considered:

1. the length of the delay;
2. the reasons for the delay;
3. the chances of the appeal succeeding if time for appealing is extended; and
4. the degree of prejudice to the potential respondent if the application is granted.

These factors are merely a framework or guide for the purpose of exercising the discretion and are not intended to be rigid mandatory requirements. It is not necessary that all the 4 factors must be in favour of an applicant in order that the discretion may be exercised to the applicant's benefit.

Hau Khee Wee & Anor v. Chua Kian Tong & Anor. [1987] 2 MLJ 146 (Singapore case).

Pearson v. Chen Chien Wen Edwin [1991] 3 MLJ 208 CA (Singapore case).

Development & Commercial Bank Bhd. v. Tan Ong Hwa [1992] 2 MLJ 764.

Batang Kali Estates Sdn. Bhd. v. Romani bte Abdul Aziz & Anor. [1993] 2 MLJ 267.

C. M. Van Stillevoldt BV v. El Carriers Inc. [1983] 1 AER 699; *N v. N* [1993] 2 FLR 868 CA (though both cases lastly mentioned concern extensions of time for setting down the appeals, nevertheless the factors are applicable to an extension of time to appeal. In the latter case the delay was some 20 months and there were a number of errors which, not unexpectedly, were different in nature from those in our present case; time was extended).

On the facts and the circumstances of the present case, the delay, though of some considerable time, has been, to my mind, reasonably explained and is also shown to be connected to steps taken in relation to the order of 25 January 1992 now intended to be appealed against.

As regards the element of the chances of success of the appeal if extension of time is granted, I prefer to say no more than that there seems some merits since the amount entered for the judgment appears to be far exceeding the counterclaim which is made by the 1st defendant only. It is the settled practice of the Court to assess and take into account the merits of the proposed appeal in deciding whether or not to grant extension of time for appealing. See *Norwich & Peterborough Building Society v. Steed* [1991] 1 WLR 449.

As for the 4th factor, I see no prejudice to the defendants should extension be granted.

After considering the facts and the circumstances relating to this application and testing them against the 4 factors above mentioned, I am satisfied that the discretion of the Court ought to be exercised in granting the relief sought. The plaintiff shall have 4 days from today within which to file a notice of appeal and shall serve a copy thereof on the defendants through their advocates not less than 7 days before the date fixed for hearing the appeal. Costs of and occasioned by this application be paid by the plaintiff to the defendants. In the absence of an agreement, such costs may be taxed.